



Staff Report

To the Committees on Appropriations of the House and
Senate on the Status of CPSC Efforts to Provide Third
Party Testing Burden Reduction While Assuring
Compliance

March 28, 2016

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1 Introduction

The House of Representatives Report 114-194, *Financial Services and General Government Appropriations Bill, 2016*, included the following section:

Test Burden Reduction.-The fiscal year 2015 enacted bill provided \$1,000,000 for test burden reduction and directed CPSC to report to the Committee on its efforts to work with the regulated community and identify steps CPSC can take to reduce third-party testing costs while still assuring compliance. The Committee is disappointed by the limited scope of the Commission's report and its failure to make real strides towards tangible test burden reduction. The CPSC has identified a significant number of opportunities for test burden reduction, yet there continues to be no meaningful relief. The Committee provides another \$1,000,000 in fiscal year 2016 for third-party test burden reduction and urges the Commission to take actionable steps to provide demonstrable relief from the burdens of third-party testing. The Committee directs the Commission to provide quarterly reports updating the Committees on Appropriations of the House and Senate on its efforts to reduce the costs of third-party testing, including any that the Commission has chosen not to pursue.¹

This document is the required March 2016 quarterly report.

2 CPSC Fiscal Year 2015 Operating Plan

The Commission was working on burden reduction efforts before the appropriations report language, as shown in FY 2015 Operating Plan², which included the following project:

Burden reduction consistent with assuring compliance

This project provides funding, as specified by Congress in Public Law No. 113-508, for ongoing and expanded efforts toward providing meaningful reduction of third party testing costs of children's products consistent with assuring compliance with all applicable rules, regulations, bans, and standards. During the fiscal year, and within the available funding level, staff will prepare for Commission consideration a draft notice of proposed rulemaking (NPR) that addresses reduction of third party testing costs on as many of the following categories as staff determines can be accomplished consistent with assuring compliance:

¹ <https://www.congress.gov/114/crpt/hrpt194/CRPT-114hrpt194.pdf>.

² <http://www.cpsc.gov/Global/About-CPSC/Budget-and-Performance/FY2015OperatingPlannew.pdf>.

- Component Part Testing Update – Heavy Metals in Toys;
- Determinations Expansion – Heavy Metals in Toys;
- Determinations Expansion – Phthalates;
- Fourier Transform Infrared Spectroscopy (“FTIR”) Study Expansion – Phthalates Testing;
- Determinations Expansion – Lead;
- Determinations Clarification – Textiles dyes/prints; and
- Equivalency – Toy Standards.

The status of the items is presented below. CPSC notes that work from FY 2015 continued into FY 2016.

3 CPSC Fiscal Year 2016 Operating Plan

The Commission’s Fiscal Year 2016 Operating Plan³ includes the following project listing an NPR and two Final Rules (“FRs”):

25727 - Burden Reduction/Assure Compliance

This project provides funding, as specified by Congress in the Consolidated Appropriations Act 2016, for ongoing efforts toward potentially providing meaningful reduction of third party testing costs of children’s products consistent with assuring compliance with all applicable rules, regulations, bans, and standards. During the fiscal year, and within the available funding level, staff will prepare for Commission consideration draft Federal Register notices and supporting briefing packages that address reduction of third party testing costs on as many of the following categories staff determines that a reduction in third party testing costs can be accomplished consistent with assuring compliance:

- Determinations Expansion – Heavy Metals in Toys (FR)
- Determinations Expansion – Specific Plastics (NPR)
- Determinations Expansion – Lead (FR)

Staff will also continue to work on advancing the state of technology for Fourier Transform Infrared Spectroscopy (FTIR) for phthalates testing.

The status of these items is presented below.

4 Status of Effort

4.1 Component Part Testing Update — Heavy Metals in Toys

This effort concerns CPSC’s component part testing rule, 16 C.F.R. part 1109 (“1109 rule”). The 1109 rule allows testing at the component part level for compliance to an applicable product safety rule when the entire product is not needed for that test. Tests for chemicals

³ Available at: <http://www.cpsc.gov/global/about-cpsc/budget-and-performance/2016opplan.pdf>.

(e.g., lead, phthalates, the solubility of elements listed in Table 1 of ASTM F963-11⁴ (“Toy Standard”) for toys), and certain other mechanical or performance tests can be performed at the component part level. The regulated community has expressed some uncertainty about whether component part testing can be used to assess compliance with these Toy Standard requirements.

In Fiscal Year 2016, CPSC finalized an amendment to the 1109 rule to clarify that component part testing is allowed to determine compliance with the ASTM F963-11 solubility requirements, and for any other test for which the finished product is not required. (81 FR 2, January 4, 2016).⁵

4.2 Determinations Expansion — Heavy Metals in Toys

Table 1 of the Toy Standard⁶ requires that substrate materials of certain toys pass a solubility test for eight elements.⁷ Because these toys are children’s products, third party laboratory testing is required.

In Fiscal Year 2016, CPSC finalized a rule, 16 C.F.R. part 1251, *Toys: Determination Regarding Heavy Elements Limits for Unfinished and Untreated Wood*. (80 FR 78651, December 17, 2015).⁸ This rule exempts unfinished and untreated wood from third party testing to determine compliance with the ASTM F963-11 solubility requirements.

4.3 Determinations Expansion — Phthalates and

Determinations Expansion — Specific Plastics

Phthalates are synthetic chemicals and are applied intentionally to materials to “plasticize,” or soften them. The CPSIA prohibits children’s toys and child care articles from containing more than 0.1 percent of certain phthalates. Manufacturers must conduct third party testing to certify that children’s products meet this requirement. CPSC staff engaged a contractor to study the production, use, and disposition of phthalates in consumer products. In addition, the contractor researched four specified plastics⁹ to assess whether those specified plastics contain more than the maximum allowable level of phthalates.

CPSC staff is developing a draft NPR recommending that the Commission determine that the four plastics do not contain phthalates above the limit specified in section 108 of the CPSIA (0.1 percent, or 1,000 parts per million (“ppm”)), and thus, do not require third party testing for use in children’s toys and child care articles. The draft NPR is due to the Commission in FY 2016.

⁴ *Standard Consumer Safety Specification for Toy Safety*, found at: <http://www.astm.org/Standards/F963.htm>.

⁵ <https://www.gpo.gov/fdsys/pkg/FR-2016-01-04/pdf/2015-33068.pdf>.

⁶ This standard was made mandatory via section 106 of the CPSIA.

⁷ The elements are antimony, arsenic, barium, cadmium, chromium, lead, mercury, and selenium.

⁸ <https://www.gpo.gov/fdsys/pkg/FR-2015-12-17/pdf/2015-31723.pdf>.

⁹ The plastics are polypropylene, polyethylene, high impact polystyrene, and acrylonitrile butadiene styrene.

Additionally, CPSC staff has engaged a contractor to study the presence of phthalates in additional specified plastics. CPSC staff has also engaged a contractor to study the presence of lead, phthalates, and the elements in Table 1 of the Toy Standard in specified manufactured fibers. The contractor's reports are due to CPSC at the end of FY 2016.

4.4 FTIR Study Expansion — Phthalates Testing

Manufacturers and testing laboratories have informed CPSC that the approved test methods for phthalates are the most expensive tests to conduct for required third party testing. If an inexpensive method could be developed to screen out materials with no phthalates at the concentration limit specified in section 108 of the CPSIA, numerous expensive third party tests could be avoided. Only materials with phthalate detection above the concentration limit would be subject to additional testing to determine if a prohibited phthalate was present.

CPSC staff has awarded a multiphase contract for research and development (“R&D”) services to develop an FTIR analyzer to reduce the cost, time, and labor associated with phthalates measurements. This analyzer will be capable of detecting phthalates at the 0.1 percent concentration level within the subject material. The Phase 1 effort result, a prototype analyzer, is due to be delivered by the contractor for CPSC evaluation in FY 2016. A Phase 2 contract for approximately \$500,000 is expected to be awarded in late FY 2016, based on successful achievement of the Phase 1 performance objectives for the prototype unit. The Phase 2 effort will continue developing improvements in the prototype device's design and technology focusing on several key performance parameters including repeatability, field use reliability and accuracy, and phthalate discrimination enhancements. Successful completion of Phase 2 performance objectives would lead towards a possible Phase 3 effort for approximately \$500,000 in FY 2017 to further refine the device for commercialization and deployment.

4.5 Determinations Expansion — Lead

Prior input from the regulated community has identified engineered woods (*e.g.*, plywood, particleboard, and medium-density fiberboard) as materials used in children's products that are unlikely to contain lead in excess of the limit in section 101 of the CPSIA (100 ppm). Children's products, toys, and child care articles made with engineered wood require third party testing for compliance to one or more of the materials listed in sections 101 (lead), 106 (the Toy Standard elements), or 108 (phthalates) of the CPSIA. CPSC staff engaged a contractor to study the potential presence of lead, the elements in Table 1 of the Toy Standard, and phthalates in engineered woods. CPSC staff recently received the contractor's report and plans to make the report publicly available April 2016.

CPSC staff's analysis of the report will inform staff's decision on whether to recommend that the Commission determine that specific engineered wood-based materials identified in the report that do not contain one or more of the elements listed in the CPSIA or in the Toy Standard, and thus do not require third party testing to assure compliance with the applicable children's product safety rule.

4.6 Determinations Clarification — Textiles Dyes/Prints

The regulation at 16 C.F.R. § 1500.91 lists materials that have been determined by the Commission not to contain lead at concentrations above 100 ppm. These materials do not require third party testing for use in children's products. Some members of the regulated community have expressed uncertainty about the meaning of the wording of one part of this regulation. These members sought clarification about testing exemptions for printed textiles.

In Fiscal Year 2016, CPSC finalized an amendment to 16 C.F.R. § 1500.91, to clarify that fabrics produced using printing technologies to apply dyes are included in the list of materials that do not require third party testing to determine compliance with the lead content limit.¹⁰

4.7 Equivalency — Toy Standards

The Chairman's staff, which included a child behavioral scientist permanent staff member and a toxicologist on detail, both with extensive experience with the Toy Standard, reviewed the most widely used toy standards having a global influence (ASTM F963, EN 71, and ISO 8124), to identify commonalities and differences. The Chairman's staff discussed the standards' provisions with officials in the European Union and Health Canada, and with U.S. trade association representatives. To date, the Chairman's staff's work does not support a finding of equivalence across these standards because of significant differences in test methods.

The Chairman's staff also explored the concept of compiling an alternative standard composed of the most rigorous test methods from each toy standard, and discussed the feasibility of this approach with interested stakeholders. The Chairman's staff determined that the development of an alternative standard would be unlikely to result in reduced third party testing costs.

¹⁰ This amendment was published in the same *Federal Register* notice as the amendment to 16 C.F.R. part 1109 discussed in section 4.1. See footnote 4.

5 Status Summary

The status of staff burden reduction efforts is summarized below:

| Item | Description | Deliverable | Due/Completion Date |
|------|--|---|-----------------------------|
| 4.1 | Component Part Testing Update — Heavy Metals in Toys | Final Rule amending 16 C.F.R. part 1109 | Completed January 4, 2016 |
| 4.2 | Determinations Expansion — Heavy Metals in Toys | Final Rule 16 C.F.R. part 1251 | Completed December 17, 2015 |
| 4.3 | Determinations Expansion — Phthalates and Determinations Expansion — Specific Plastics | Draft NPR on determinations for four specified plastics | FY 2016 |
| | | Contractor technical reports on phthalates in additional plastics and lead, the Toy Standard elements and phthalates in manufactured fibers | FY 2016 |
| 4.4 | FTIR Study Expansion — Phthalates Testing | Phase 1 prototype analyzer for CPSC evaluation | FY 2016 |
| | | Phase 2 FTIR contract awarded (\$500,000) | |
| 4.5 | Determinations Expansion — Lead | Contractor technical report | Received, March 2016 |
| 4.6 | Determinations Clarification — Textiles Dyes/Prints | Final Rule amending 16 C.F.R. § 1500.91 | Completed January 4, 2016 |
| 4.7 | Equivalency — Toy Standards | Not feasible for burden reduction purposes | N/A |